

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34744

NOEL JAY WHITELEY,)	2009 Unpublished Opinion No. 479
)	
Petitioner-Appellant,)	Filed: May 27, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Joel D. Horton, District Judge.

Order summarily dismissing successive application for post-conviction relief, affirmed.

Noel Jay Whiteley, Sayre, Oklahoma, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Noel Jay Whiteley appeals from the district court's order summarily dismissing his successive application for post-conviction relief, without an evidentiary hearing. Whiteley also challenges the district court's orders denying his motion to compel and motion to strike. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

In 1998, Whiteley pled guilty to second degree murder and was sentenced to a unified term of life imprisonment, with a minimum period of confinement of twenty-four years. This Court affirmed Whiteley's judgment of conviction and sentence in *State v. Whiteley*, 132 Idaho 678, 978 P.2d 238 (Ct. App. 1999). In 2000, Whiteley filed an application for post-conviction relief and an amended application for post-conviction relief, which were summarily dismissed by the district court. Whiteley appealed the district court's order but then moved to voluntarily

dismiss the appeal. Whiteley's motion was granted and a remittitur was issued. Subsequently, in 2001, Whiteley filed a motion to withdraw his guilty plea which was denied by the district court. In an unpublished opinion, this Court affirmed the denial of Whiteley's motion to withdraw his guilty plea because the district court lacked jurisdiction to hear the motion by the time Whiteley filed it two years after his judgment of conviction became final. *See State v. Whiteley*, Docket No. 28497 (Ct. App. Nov. 13, 2003).

In 2007,¹ Whiteley filed a successive application for post-conviction relief arguing that, during the underlying criminal proceedings, the state failed to disclose a note to Whiteley from his co-defendant which the state had obtained and that his guilty plea was involuntary because the state fabricated the existence of physical evidence against him. The state filed a response, arguing that it disclosed the note from the co-defendant and attached a copy of its response to Whiteley's discovery request. Additionally, the state denied the fabrication of evidence and sought summary dismissal of Whiteley's application because he had failed to raise any new allegation that he could not have raised in his first application for post-conviction relief. Furthermore, the state argued that Whiteley had failed to support any of his claims with admissible evidence. Whiteley filed motions to compel the state to produce over eighty evidentiary items and a motion to strike the state's motion to dismiss Whiteley's application because Whiteley alleged that the state argued immaterial issues.

After a hearing on the state's motion to dismiss, the district court summarily dismissed Whiteley's application for post-conviction relief. The district court found that Whiteley knew about the existence of the note from his co-defendant since his original criminal proceedings and Whiteley had presented no admissible evidence showing that the state fabricated physical

¹ As the district court correctly observed, Whiteley's application for post-conviction relief, filed nearly eight years after his judgment of conviction became final, is clearly untimely. I.C. § 19-4902 (application for post-conviction relief must be filed within one year from determination of an appeal or proceeding following an appeal). However, the state waived the issue of timeliness when it inexplicably failed to raise the bar as an affirmative defense. *See Kirkland v. State*, 143 Idaho 544, 546, 149 P.3d 819, 821 (2006) (holding that the statute of limitation for post-conviction relief is not jurisdictional, but an affirmative defense that is waived if not pleaded by the defendant). The district court also decided not to employ this effective bar to Whiteley's application sua sponte after affording adequate notice and, instead, summarily dismissed Whiteley's application on other grounds. We, therefore, do not further address the timeliness issue and review the summary dismissal of Whiteley's application on the grounds articulated by the district court.

evidence. Furthermore, the district court found that Whiteley had failed to provide a sufficient reason why his claim of evidence fabrication was not presented in his first application for post-conviction relief. The district court also denied Whiteley's motion to compel and motion to strike under I.R.C.P. 7(b)(3)(D) because he did not file a notice for a hearing. Whiteley appeals.

II.

ANALYSIS

A. Summary Dismissal of Application for Post-Conviction Relief

Whiteley argues that the district court erred by summarily dismissing his successive application for post-conviction relief. He contends that, while the state may have disclosed the note from his co-defendant and discussed its contents with Whiteley's trial counsel, the state never turned the note over to the defense. Furthermore, Whiteley contends that he has shown sufficient reason for not raising this issue, as well as his allegation of fabricated evidence, in his first application for post-conviction relief.

Idaho Code Section 19-4908 provides:

All grounds for relief available to an applicant under [the Uniform Post-Conviction Procedure Act] must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

The Idaho Supreme Court has further explained the meaning of I.C. § 19-4908:

Idaho Code § 19-4908 requires that all legal and factual grounds for relief must be raised in the first petition for post-conviction relief. Any grounds for relief not raised are permanently waived if the grounds were known or should have been known at the time of the first petition. Subsequent petitions are allowed if the [applicant] states a sufficient reason for not asserting the grounds in the earlier petition.

Stuart v. State, 118 Idaho 932, 933-34, 801 P.2d 1283, 1284-85 (1990). In *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995), this Court affirmed the summary dismissal of Hooper's successive application for post-conviction relief. In that case, this Court held that Hooper had failed to satisfy his "burden of providing the district court with factual reasons upon which the court could conclude there was a 'sufficient reason' why the grounds for relief

asserted in his second petition were ‘not asserted or were inadequately raised in the original, supplemental or amended application.’” *Id.* at 948, 908 P.2d at 1255, *quoting* I.C. § 19-4908.

In this case, Whiteley’s successive application and brief in support offer no reason justifying his failure to raise the issue of the note and the allegation of fabricated evidence in his first application for post-conviction relief. In Whiteley’s reply to the state’s motion to dismiss, he briefly acknowledges his first application and argues that these issues were removed from the amended application for post-conviction relief by his post-conviction counsel. Therefore, Whiteley contends that he could not have waived those issues because it was not his fault that they were not raised. In support of his contention, he supplied the district court with two letters which he allegedly sent to post-conviction counsel arguing that his original post-conviction issues be reinstated in the amended application. However, neither of the letters makes any mention of the allegation that the state fabricated evidence against Whiteley. Therefore, after reviewing Whiteley’s successive application, the brief in support, the reply brief to the state’s motion to dismiss and the two letters from Whiteley to his post-conviction counsel, we conclude that Whiteley has failed to provide any factual basis why this particular issue was not raised in his first application for post-conviction relief. Accordingly, the district court did not abuse its discretion by summarily dismissing this claim.

The two letters written to Whiteley’s post-conviction counsel, and supplied with Whiteley’s reply brief to the state’s motion to dismiss, mention Whiteley’s desire to have the issue of the note from his co-defendant reinstated in his application for post-conviction relief. However, we do not need to address whether this constituted a sufficient reason for not raising the issue in his first application because we conclude that Whiteley’s argument is meritless. In his successive application for post-conviction relief and his brief in support, Whiteley contended that the state never disclosed the existence of his co-defendant’s note. This contention is belied by the record, including Whiteley’s own pleadings. The state attached its original discovery response to its motion to dismiss Whiteley’s successive application. The discovery response listed a two-page letter to Whiteley from his co-defendant. In Whiteley’s brief in support of his successive application, he asserts that his counsel twice asked to see the note. Therefore, both Whiteley and his counsel knew of the existence of the note.

Whiteley now argues that the state never physically turned over the note to the defense. We express no opinion on the accuracy of this allegation or whether, if true, it constitutes error.

Even were we to assume error, it is harmless. Whiteley was not ignorant of the existence or the contents of the note. Whiteley's brief in support of his successive application states that the contents of the note were discussed in chambers between the prosecutor and trial counsel. After the discussions in chambers, trial counsel informed Whiteley of its contents. Whiteley provided no evidence that not having physical possession of the note, even when he knew of its existence and contents, prejudiced him in any way. Therefore, the district court did not abuse its discretion by summarily dismissing this claim.

B. Motion to Compel and Motion to Strike

Whiteley argues that the district court abused its discretion by denying his motion to compel and his motion to strike without a hearing. The district court denied Whiteley's motions under I.R.C.P. 7(b)(3)(D) because he did not file a notice for a hearing on either motion. Idaho Rule of Civil Procedure 7(b)(3)(D) provides, in pertinent part:

If the moving party does not request oral argument upon the motion, and does not file a brief within fourteen (14) days, the court may deny such motion without notice if the court deems the motion has no merit. . . .

The district court had discretion to deny Whiteley's motions without notice, provided they had no merit. We have reviewed Whiteley's motions and conclude that they are meritless. Therefore, the district court did not abuse its discretion by denying them without notice when Whiteley failed to file a notice for a hearing for either motion.

III.

CONCLUSION

The district court did not abuse its discretion by summarily dismissing Whiteley's successive application for post-conviction relief. Furthermore, the district court did not abuse its discretion by denying Whiteley's meritless motions to compel and to strike for failing to file a notice of hearing. Accordingly, the district court's orders summarily dismissing Whiteley's successive application for post-conviction relief and denying Whiteley's motions to compel and to strike are affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**